Minority Media and Telecommunications Council

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September 14, 2010

Marlene H. Dortch, Esq.
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Dear Ms. Dortch:

RE: Notice of Ex Parte Communication: Sirius XM Set Aside, MB Docket No. 07-57

This reports on two meetings held Monday, September 13, 2010. The first meeting was held with Mark Lloyd, Associate General Counsel and Chief Diversity Officer. The second meeting was held with Angela Kronenberg, Acting Chief of Staff and Wireline Legal Advisor for Commissioner Mignon Clyburn. MMTC Fellow Joycelyn James, Esq. and I participated in both meetings behalf of MMTC.

In these meetings, MMTC discussed the highlights of its September 3, 2010 ex parte letter regarding the possibility of the Commission changing its position on merger conditions requiring Sirius XM to offer channels to minority-owned companies. Instead, the Commission will potentially, without notice, define Sirius XM "eligible entities" as any entity not now programming channels for Sirius XM.

We agree that resolving these merger conditions would bring closure to an issue that has lingered for some time. However, we do not believe that the proposed definition of eligible entities furthers the Commission's goals of diversity and inclusion. Further, if treated even as partly precedential, which is likely in practice, the proposed definition would risk setting back equal opportunity by several years.

We reiterated that the proposed definition risks creating a pool of candidates so racially dilute as to have no practical benefit to minority-owned programmers interested in doing business with Sirius XM. To remain true to the original purpose of promoting minority participation, the Sirius XM set-aside program should be revised to include three race neutral factors: (1) Institutions based on mission, not race (such as Historically Black Colleges and Universities (HBCUs), Hispanic Serving Institutions (HSIs), Asian American Serving Institutions (AASIs) and Native American Serving Institutions (NASIs)); (2) multilingual programmers, a classification based on language, not race; (3) and tribal organizations, a classification based on treaty relationships, not race.

The proposed eligible entities definition points to a hole in the record that must be filled before the Commission can proceed with considering the merger conditions. As discussed in our September 3 ex parte letter, the public had no notice that the Commission was considering a new definition of eligible entities (for this or any other proceeding) that is even more dilute that the current small business definition. While the original set-aside is unconstitutional on its face under current 14th Amendment standards, the Commission's change of course should be subject to public notice and comment as proscribed by the Administrative Procedure Act, 5 U.S.C. §553(b)-(c). Such action will create a complete record on the matter, allowing the Commission to make a well-informed decision on this merger condition.

Sincerely,

David Honig
President and Executive Director